

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

JOHNNIE COOK #270691,

Plaintiff,

Case No. 2:07-cv-162

v.

Honorable R. Allan Edgar

UNKNOWN LAPONSIE, et al.,

Defendants.

OPINION AND ORDER APPROVING MAGISTRATE JUDGE'S

REPORT AND RECOMMENDATION

The Court has reviewed the Report and Recommendation filed by the United States Magistrate Judge on May 27, 2008. The Report and Recommendation was duly served on the parties and recommended that the Court grant Defendant LaPonsie's first motion for summary judgment (docket #18) be granted in part, and that his second motion for summary judgment (docket #21) be granted in entirety, resulting in the dismissal of Plaintiff's complaint. The Court received objections from the Plaintiff. In accordance with 28 U.S.C. § 636(b)(1), the Court has performed *de novo* consideration of those portions of the Report and Recommendation to which objection has been made. The Court now finds the objections to be without merit.

In the report and recommendation, the Magistrate Judge concluded that Plaintiff had failed to exhaust his administrative remedies with regard to his claims regarding threats he received in December, 2006. Plaintiff now claims that he was hindered in his ability to exhaust these claims by his inability to read or write, and staff rejecting his grievances. However, Plaintiff has failed to show that he attempted to grieve these incidents and that his attempts were rejected. Moreover,

Plaintiff successfully filed other grievances. Therefore, the Magistrate Judge properly recommended dismissal of these claims without prejudice.

With regard to Plaintiff's excessive force claims against Defendant LaPonsie, the Magistrate Judge found that the alleged misconduct did not rise to the level of an Eighth Amendment violation. Plaintiff fails to assert any additional facts in support of his Eighth Amendment claim. For the reasons set forth in the report and recommendation, Plaintiff's complaint is properly dismissed.

IT IS ORDERED that the Report and Recommendation of the Magistrate Judge is approved and adopted as the opinion of the court and Defendant LaPonsie's motion for summary judgment (docket #21) will be granted.

IT IS FURTHER ORDERED that an appeal of this action would not be in good faith within the meaning of 28 U.S.C. § 1915(a)(3). *See McGore v. Wigglesworth*, 114 F.3d 601, 611 (6th Cir. 1997). For the same reasons that the Court dismisses the action, the Court discerns no good-faith basis for an appeal. Should plaintiff appeal this decision, the Court will assess the \$255 appellate filing fee pursuant to § 1915(b)(1), *see McGore*, 114 F.3d at 610-11, unless plaintiff is barred from proceeding *in forma pauperis*, e.g., by the "three-strikes" rule of § 1915(g). If he is barred, he will be required to pay the \$455 appellate filing fee in one lump sum. Accordingly, should plaintiff seek to appeal this matter to the Sixth Circuit, the appeal would be frivolous and not taken in good faith.

Dated: 9/26/08

/s/ R. Allan Edgar
R. ALLAN EDGAR
UNITED STATES DISTRICT JUDGE